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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 JOHN J. BALCOM,

11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN, Acting
14 Commissioner of the Social Security
Administration,

15 Defendant.
16

CASE NO. 14-cv-05670 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
18 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.
19 Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States
20 Magistrate Judge, Dkt. 6). This matter has been fully briefed (*see* Dkt. 13, 14, 15).

21 After considering and reviewing the record, the Court concludes that although the
22 ALJ gave great weight to the opinion from an examining doctor, he failed to explain why
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1 the examining doctor's opinion that plaintiff was limited to simple and repetitive tasks
2 was not accommodated into plaintiff's residual functional capacity.

3 Because this error is not harmless, this matter is reversed pursuant to sentence four
4 of 42 U.S.C. § 405(g) and remanded to the Acting Commissioner for further
5 consideration consistent with this order.

6 BACKGROUND

7 Plaintiff, JOHN J. BALCOM, was born in 1965 and was 43 years old on the
8 alleged date of disability onset of May 1, 2009 (*see* AR. 275-82, 282-88). Plaintiff has
9 completed one year of college (AR. 52). He has work experience as a catering chef, chef,
10 and laborer (AR. 389-96). Plaintiff last worked "throwing freight" in a grocery store, but
11 when he received a note from his doctor that he could lift no more than ten pounds, he
12 was terminated (AR. 44).

13 According to the ALJ, plaintiff has at least the severe impairments of "Cervical
14 Spine degenerative disc disease status post C6-7 fusion (20 CFR 404.1520(c) and
15 416.920(c))" (AR. 17).

16 At the time of the hearing, plaintiff was living in his trailer on his parents'
17 property (AR. 42).

18 PROCEDURAL HISTORY

19 On August 1, 2011, plaintiff filed applications for disability insurance ("DIB")
20 benefits pursuant to 42 U.S.C. § 423 (Title II) and Supplemental Security Income ("SSI")
21 benefits pursuant to 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act (AR. 275-
22 81, 282-88). The applications were denied initially and following reconsideration (*see*
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1 AR. 108-20, 121-33, 145-59, 160-74). Plaintiff's requested hearing was held before
2 Administrative Law Judge Robert P. Kingsley ("the ALJ") on February 5, 2013 (*see* AR.
3 36-75). On February 22, 2013, the ALJ issued a written decision in which the ALJ
4 concluded that plaintiff was not disabled pursuant to the Social Security Act (*see* AR. 12-
5 35).

6 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether or
7 not the ALJ properly evaluated the medical evidence; (2) Whether or not the ALJ
8 properly evaluated plaintiff's testimony; (3) Whether or not the ALJ properly assessed
9 plaintiff's residual functional capacity; and (4) Whether or not the ALJ erred by basing
10 his step five finding on a residual functional capacity assessment that did not include all
11 of plaintiff's limitations (*see* Dkt. 13, p. 1).

13 STANDARD OF REVIEW

14 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
15 denial of social security benefits if the ALJ's findings are based on legal error or not
16 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
17 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
18 1999)).

19 DISCUSSION

20 (1) **Whether or not the ALJ properly evaluated the medical evidence.**

21 Plaintiff argues that the ALJ erred "by stating that he is giving great weight to Dr.
22 Parker's opinion, while then failing to include in his residual functional capacity [RFC]
23 assessment Dr. Parker's opinion that [plaintiff] was limited to simple and repetitive
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1 tasks” (Dkt. 13, p. 11 (*citing* AR. 25-26, 480)). For the reasons discussed herein, the
2 Court agrees with plaintiff’s argument regarding the opinion of Dr. James Parker, M. D.,
3 who examined plaintiff on September 1, 2010 (*see* AR. 477-80).

4 When an opinion from an examining doctor is contradicted by other medical
5 opinions, the examining doctor’s opinion can be rejected “for specific and legitimate
6 reasons that are supported by substantial evidence in the record.” *Lester v. Chater*, 81
7 F.3d 821, 830-31 (9th Cir. 1996) (*citing* *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir.
8 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

9 Here, the ALJ rejected without comment or explanation the opinion from Dr.
10 Parker that plaintiff was limited to simple and repetitive tasks and therefore the ALJ did
11 not provide any specific and legitimate rationale for rejecting this opinion. *See id.* (*see*
12 *also* AR. 25-26, 480). Although Dr. Parker opined that plaintiff was limited to the
13 performance of simple and repetitive tasks (*see* AR. 480), the ALJ’s RFC did not include
14 this limitation (*see* AR. 21). Not only did the ALJ fail to provide any reason for rejecting
15 this opinion from Dr. Parker, but also, the ALJ did not give any reason for failing to
16 reject any opinion from Dr. Parker (*see* AR. 25-26). In contrast, the ALJ indicated that he
17 gave “great weight” to Dr. Parker’s opinions because Dr. Parker examined plaintiff and
18 because of the ALJ’s conclusion that Dr. Parker’s “opinion is consistent with the findings
19 of his examination” (*see id.* (*citing* AR. 278-79)).

20 For the reasons stated and based on the record as a whole, the Court concludes that
21 the ALJ erred by failing to provide specific and legitimate reason for not including the
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1 opinion from Dr. Parker that plaintiff only could perform simple and repetitive tasks into
2 plaintiff's RFC.

3 In addition, according to Social Security Ruling ("SSR") 96-8p, a residual
4 functional capacity assessment by the ALJ "must always consider and address medical
5 source opinions. If the RFC assessment conflicts with an opinion from a medical source,
6 the adjudicator must explain why the opinion was not adopted." *See* SSR 96-8p, 1996
7 SSR LEXIS 5 at *20. Although "Social Security Rulings do not have the force of law,
8 [n]evertheless, they constitute Social Security Administration interpretations of the
9 statute it administers and of its own regulations." *See Quang Van Han v. Bowen*, 882
10 F.2d 1453, 1457 (9th Cir. 1989) (citing *Paxton v. Sec. HHS*, 865 F.2d 1352, 1356 (9th
11 Cir. 1988); *Paulson v. Bowen*, 836 F.2d 1249, 1252 n.2 (9th Cir. 1988)) (internal citation
12 and footnote omitted). As stated by the Ninth Circuit, "we defer to Social Security
13 Rulings unless they are plainly erroneous or inconsistent with the [Social Security] Act or
14 regulations." *Id.* (citing *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984);
15 *Paxton, supra*, 865 F.2d at 1356)) (footnote omitted). Therefore, the ALJ's failure to
16 explain why his RFC did not accommodate the opinion from Dr. Parker also violates this
17 Social Security ruling. *See* SSR 96-8p, 1996 SSR LEXIS 5 at *20.

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19 Furthermore, the Ninth Circuit has concluded that it is not harmless error for the
20 ALJ to fail to discuss a medical opinion. *Hill v. Astrue*, 698 F.3d 1153, 1160 (9th Cir.
21 2012) ("the ALJ's disregard for Dr. Johnson's medical opinion was not harmless error
22 and Dr. Johnson's opinion should have been considered") (citing 20 C.F.R. § 404.1527(c)
23 (noting that this Ruling requires the evaluation of "every medical opinion" received)).
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1 According to the Ninth Circuit, when the ALJ ignores significant and probative evidence
2 in the record favorable to a claimant's position, such as an opinion from an examining or
3 treating doctor, the ALJ "thereby provide[s] an incomplete residual functional capacity
4 [RFC] determination." *See id.* at 1161. Furthermore, when the RFC is incomplete, the
5 hypothetical question presented to the vocational expert relied on at step five necessarily
6 also is incomplete, "and therefore the ALJ's reliance on the vocational expert's answers
7 [is] improper." *See id.* at 1162.

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9 The Court also concludes that the ALJ's failure to resolve the conflict between Dr.
10 Parker's opinion and the ALJ's RFC is not harmless error. *See id.*

11 The Ninth Circuit has "recognized that harmless error principles apply in the
12 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
13 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
14 Cir. 2006) (collecting cases)). The Ninth Circuit noted that "in each case we look at the
15 record as a whole to determine [if] the error alters the outcome of the case." *Id.* The court
16 also noted that the Ninth Circuit has "adhered to the general principle that an ALJ's error
17 is harmless where it is 'inconsequential to the ultimate nondisability determination.'" *Id.*
18 (quoting *Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008))
19 (other citations omitted). Courts must review cases "'without regard to errors' that do not
20 affect the parties' 'substantial rights.'" *Id.* at 1118 (quoting *Shinsheki v. Sanders*, 556
21 U.S. 396, 407 (2009) (quoting 28 U.S.C. § 2111) (codification of the harmless error
22 rule)).
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1 If the ALJ had accommodated Dr. Parker's opinion regarding plaintiff's limitation
 2 to simple and repetitive tasks into plaintiff's RFC, it would have altered the hypothetical
 3 presented to the vocational expert ("VE"), and altered the VE's testimony regarding
 4 plaintiff's ability to perform other jobs existing in the national economy. The ALJ relied
 5 on the VE's testimony when making his ultimate determination that plaintiff is not
 6 disabled (*see* AR. 28). Therefore, the ALJ's error in failing to include Dr. Parker's
 7 opinion that plaintiff is limited to simple and repetitive tasks into plaintiff's RFC or to
 8 explain why it was not accommodated into plaintiff's RFC is not harmless error.

9 Although defendant provides a potential explanation to resolve the conflict, according to
 10 the Ninth Circuit, "[l]ong-standing principles of administrative law require us to review
 11 the ALJ's decision based on the reasoning and actual findings offered by the ALJ - - not
 12 *post hoc* rationalizations that attempt to intuit what the adjudicator may have been
 13 thinking." *Bray v. Comm'r of SSA*, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (*citing SEC v.*
 14 *Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation omitted)); *see also Molina v.*
 15 *Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012) ("we may not uphold an agency's decision
 16 on a ground not actually relied on by the agency") (*citing Chenery Corp, supra*, 332 U.S.
 17 at 196). Therefore, defendant's *post hoc* rationalization does not excuse the ALJ's error.

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 19 **(2) Whether or not the ALJ properly evaluated plaintiff's testimony.**

20 The Court already has concluded that the ALJ erred in reviewing the medical
 21 evidence and that this matter should be reversed and remanded for further consideration,
 22 *see supra*, section 1. In addition, a determination of a claimant's credibility relies in part
 23 on the assessment of the medical evidence, which must be evaluated anew. *See* 20 C.F.R.
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1 § 404.1529(c). Therefore, for this reason, plaintiff's credibility should be assessed anew
2 following remand of this matter. Similarly, the RFC, as a necessity, must be determined
3 anew following remand of this matter, and the remainder of the sequential disability
4 evaluation process must be completed anew following remand.

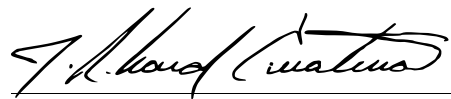
5 CONCLUSION

6 The ALJ erred when he gave great weight to the opinion by an examining doctor,
7 but failed to explain why one of the doctor's opinions was not accommodated into
8 plaintiff's RFC.
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10 Based on the stated reasons and the relevant record, the Court **ORDERS** that this
11 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
12 405(g) to the Acting Commissioner for further consideration consistent with this order.

13 **JUDGMENT** should be for plaintiff and the case should be closed.

14 Dated this 23rd day of March, 2015.

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17 J. Richard Creatura
18 United States Magistrate Judge
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